IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 7603 of 2022

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RAJESHKUMAR UMESHGIRI GAUSWAMI

Versus

STATE OF GUJARAT

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Appearance:
MS.NAMRATA J SHAH(6534) for the Petitioner(s) No. 1
DS AFF.NOT FILED (N) for the Respondent(s) No. 2,3
MS DHARITRI PANCHOLI, AGP for the Respondent(s) No. 1
NOTICE SERVED BY DS for the Respondent(s) No. 4
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CORAM:**HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI**

Date : 05/05/2022

ORAL ORDER

1. Rule. Ms. Dharitri Pancholi, the learned AGP waives service of notice of rule for the respondents.

2. This writ-application is filed under Article 226 of the Constitution of India by the writ-applicant seeking for the following reliefs which are produced thus :-

> *"(A) This Hon'ble Court may be pleased to admit and allow this petition;*
>
> *(B) This Hon'ble Court may be pleased to issue appropriate writ, order or direction for releasing the three chaff cutter machines along with electric motor and generator of the ownership of the petitioner which is seized by the respondents and at present the case is pending witht he respondent, on*

such terms and conditions as this Hon'ble Court may deem think fit.

(C) This Hon'ble Court may be pleased to quash and set aside the show cause notice dated 25.01.2022 issued in connection with the machines and generator of the ownership of the petitioner which is seized by the respondents.

(D) Pending admission and final disposal of this petition, your lordships may be pleased to release the three chaff cutter machines along with electric motor and generator on appropriate terms and conditions that may be deem fit and proper to this Hon'ble court.

(E) Grant such other and further relief as thought fit in the interest of justice."

3. Heard Ms. Namrata J. Shah, the learned advocate appearing for the writ-applicant and Ms. Dharitri Pancholi, the learned AGP appearing for the respondents.

4. Ms. Namrata J. Shah, the learned advocate appearing for the writ-applicant submitted that the writ-applicant is owner of the three chaff cutter machines alongwith electric motor and one generator. It is submitted that the machines were seized and seizure memo pertaining to the same came to be issued on 13.01.2022 and show cause notices came to be issued on 25.01.2022 imposing penalty of Rs.10,82,390/-.

4.1 Ms. Shah, the learned advocate for the writ-applicant submitted that the writ-applicant preferred a representation before the respondent authority to release his machines under the provisions of Rule 12(2)(b)(ii) on 14.03.2022.

4.2 It is submitted that in absence of any F.I.R. registered beyond the specified period, the action of the respondent authority seizing the machines, is illegal and against the principles laid down by this Court in the case of Nathubhai Jinabhai Gamara v. State of Gujarat, rendered in Special Civil Application No.9203 of 2020. It is submitted that this Court has categorically held and observed that if the complaint is not registered as envisaged under sub-clause (ii) of sub-clause (b) of sub-Rule (2) of Rule 12 of the Rules of 2017, in absence of the complaint, the competent authority will have no option but to release the seized machines without insisting for any bank guarantee. Therefore, the principles laid down by this Court in the case of Nathubhai Jinabhai Gamara v. State of Gujarat (supra) applies to the facts of the present case. It is therefore urged that the petition deserves to be allowed directing the respondent authorities to release the machines.

4.3 In view of the ratio as laid down by the Coordinate Bench of this Court in the Special Civil Application No.9203 and Letters Patent Appeal No.717 of 2020 wherein this Court took the view that either FIR or written complaint as contemplated

under Rule 12 is required to be filed within a period of 45 days from the date of seizure and in absence of the same the machines be released unconditionally.

4.4 The writ-applicant has stated that the notice was issued by this Court making it returnable on 5.05.2022. After issuance of notice by this Court a criminal complaint for confiscation proceeding came to be initiated by the respondent authority and FIR came to be registered on 21.03.2022, which was undisputedly after seizure of 45 days.

4.5 It is urged that the petition be entertained only for the limited purpose of release of the machines. So far as the adjudication of the show cause notices is concerned, the petitioner be permitted to pursue the said show cause notice as per the provisions of the Act.

5. On the other hand, the learned Assistant Government Pleader has fairly conceded on instructions that after the issuance of the seizure memo followed by the show cause notices, no orders have been passed considering the pendency of the writ petition. It is also conceded on instructions that no First Information Report has been registered as provided under the provisions of Rules of 2017. However, the FIR has been registered on 21.03.2022, after period of 45 days.

6. Heard the learned advocates appearing for the respective

parties.

7. It is undisputed that seizure memo was issued on 13.01.2022 followed by the show cause notice dated 25.1.2022. It is not disputed rather conceded that within a period of 45 days, no First Information Report has been registered by the respondent authority. Therefore, the principle laid down by this Court in the case of Nathubhai Jinabhai Gamara v. State of Gujarat (supra) applies to the facts of the present case.

8. In the aforesaid judgment, this Court, while dealing with the provisions of the sub-clause (ii) of sub-clause (b) of sub-Rule (2) of Rule 12 of the Rules of 2017, in paragraphs 7, 10 and 11 has held and observed thus:-

> "7. Pertinently the competent authority under Rule 12 is only authorized to seize the property investigate the offence and compound it; the penalty can be imposed and confiscation of the property can be done only by order of the court. Imposition of penalties and other punishments under Rule 21 is thus the domain of the court and not the competent authority. Needless to say therefore that for the purpose of confiscation of the property it will have to be produced with the sessions court and the custody would remain as indicated in sub-rule 7 of Rule 12. Thus where the offence is not compounded or not compoundable it would be obligatory for the investigator

to approach the court of sessions with a written complaint and produce the seized properties with the court on expiry of the specified period. In absence of this exercise, the purpose of seizure and the bank guarantee would stand frustrated; resultantly the property will have to be released in favour of the person from whom it was seized, without insisting for the bank guarantee.

10. The bank guarantee is contemplated to be furnished in three eventualities: (i) for the release of the seized property and (ii) for compounding of the offence and recovery of compounded amount, if it remains unpaid on expiry of the specified period of 30 days; (iii) for recovery of unpaid penalty. Merely because that is so, it cannot be said that the investigator would be absolved from its duty of instituting the case on failure of compounding of the offence. Infact offence can be compounded at two stages being (1) at a notice stage, within 45 days of the seizure of the machines; (2) during the prosecution but before the order of confiscation. Needless to say that for compounding the offence during the prosecution, prosecution must be lodged and it is only then that on the application for compounding, the bank guarantee could be insisted upon. In absence of prosecution, the question of bank guarantee would not arise; nor would the question of compounding of offence.

> 11. The deponent of the affidavit appears to have turned a blind eye on Rule 12 when he contends that application for compounding has been dispensed with by the amended rules inasmuch as; even the amended Rule 12(b)(i) clearly uses the word "subject to receipt of compounding application". Thus the said contention deserve no merits. Thus, in absence of the complaint, the competent authority will have no option but to release the seized machines without insisting for bank guarantee. There is thus a huge misconception on the part of the authority to assert that even in absence of the complaint it would have a dominance over the seized property and that it can insist for a bank guarantee for its."

It has been held that it would be obligatory for the investigator to approach the Court of Sessions with a written complaint and produce the seized properties with the Court on expiry of the specified period. In absence of such exercise, the purpose of seizure and the bank guarantee would stand frustrated; resultantly, the property will have to be released in favour of the person from whom it was seized, without insisting for the bank guarantee.

9. In view of the fact that no First Information Report has been registered by the competent authority before completion of the 45 days and the principle laid down by this Court in the aforesaid case applies to the facts of the present case, the

present writ-application deserves to be allowed and is accordingly allowed to the limited extent of directing the respondent to release the machines of the writ-applicant pending adjudication before the Sessions Court on the condition the writ-applicant deposits solvent surety equivalent to the amount of penalty with the competent Court. Further the writ-applicant is directed to fulfill the following conditions :-

(i) The writ-applicant shall furnish a solvent surety equivalent to the amount of penalty with the competent Court.

(ii) The writ-applicant shall file an undertaking on oath before the learned trial Court that the writ-applicant shall not transfer, alienate, part with the possession of the machines or create any charge over the machines till the conclusion of the trial.

(iii) The writ-applicant shall produce the machines as and when the Authority or the Court concerned directs him to do so.

10. This Court has not assessed the merits of the matter. It is directed that the Court below shall proceed with the complaint pending before the said Court independently and in accordance with law.

11. This order is passed in the peculiar facts and circumstances of the present case.

12. In view of the aforementioned discussion, the writ-application succeeds and is accordingly allowed. Rule is made absolute to the aforesaid extent. No order as to costs. Direct service is permitted.

(VAIBHAVI D. NANAVATI,J)

K.K. SAIYED